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October 28, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 18, 2004

Case No.: TIA-0115

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs, one of which is administered by the DOE.¹

The DOE program is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests

¹ The Department of Labor administers the other program. See 10 C.F.R. Part 30; www.dol.gov.esa.

the claim. 42 U.S.C. § 7385o(e)(3). As the foregoing indicates, the DOE program itself does not provide any monetary or medical benefits.

To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program.²

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request that the DOE's Office of Hearings and Appeals review certain OWA decisions. An applicant may appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

B. Procedural Background

The Applicant was employed at DOE's Rocky Flats site. He worked at the site as a computer drafting designer for nearly 4 years, from 1991 to 1995.

The Applicant filed an application with OWA, requesting physician panel review of three illnesses. The Physician Panel rendered a negative determination on each of the claimed illnesses and explained the basis of each determination. The OWA accepted the Physician Panel's negative determination on each of the claimed illnesses.

The Applicant appeals the negative determination on one of the illnesses - thyroid cancer. For the thyroid cancer, the Panel agreed that the Applicant had the illness, but the Panel determined that there was insufficient evidence establishing a relationship between any exposures at the Applicant's workplace and the illnesses.

II. Analysis

Under the Physician Panel Rule, independent physicians render an opinion whether a claimed illness is related to a toxic exposure during employment at DOE. The Rule requires that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

We have not hesitated to remand an application where the Panel report did not address all the claimed illnesses,³ applied the wrong

² See www.eh.doe.gov/advocacy.

³ *Worker Appeal*, Case No. TIA-0030, 28 DOE ¶ 80,310 (2003).

standard,⁴ or failed to explain the basis of its determination.⁵ On the other hand, mere disagreements with the Panel's opinion are not a basis for finding Panel error.

In his appeal, the Applicant maintains that the Panel's negative determination is incorrect. The Applicant advances several arguments which are considered below.

First, the Applicant argues that the Panel's negative determination is incorrect because thyroid cancer is most notably linked to occupational and environmental exposures, and different levels of radiation affect different people differently. The Applicant's argument does not provide a basis for finding panel error. The Panel addressed the claimed illness, made a determination on the illness, and explained the basis of that determination – that there was insufficient evidence establishing a relationship between any workplace exposures and the Applicant's illness. The Applicant's argument is merely disagreement with the Panel's medical judgment rather than an indication of panel error.

Second, the Applicant argues that the fact that he did not have any of the conditions or treatments listed by the Panel as other risk factors indicates that the cause of his cancer was occupational exposures to radiation. This argument does not provide a basis for finding panel error. In listing other risk factors of thyroid cancer, the Panel was speculating as to the most common risks to the thyroid gland and was not stating that the Applicant was affected by those other factors. Although the Panel discussed some possible causes for thyroid cancer, the key determination here was that the Applicant's illness was not related to toxic exposures at a DOE site.

Lastly, the Applicant argues that the Physician Panels are issuing too many negative determinations on cancer claims. The Applicant's argument does not provide a basis for granting the appeal. In making its determinations, the Panel must follow the regulations set forth by the DOE in the Physician Panel Rule. See 10 C.F.R. Part 852. In the instant case, the Panel addressed each claimed illness, made a determination on each illness, and explained the basis of each determination. Accordingly, the Applicant's argument does not indicate panel error.

As the foregoing indicates, the appeal does not provide a basis for finding panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0115 be, and hereby is, denied.

⁴Worker Appeal, Case No. TIA-0032, 28 DOE ¶ 80,322 (2004).

⁵Id.

(2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 28, 2004